

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-35887

CHARLES M. WEBB

Debtor

N. DAVID ROBERTS, JR., TRUSTEE

Plaintiff

v.

Adv. No. 03-3149

CHARLES M. WEBB

Defendant

**MEMORANDUM ON PLAINTIFF'S  
MOTION TO SET ASIDE DISMISSAL ORDER**

**APPEARANCES:** BAILEY, ROBERTS & BAILEY, P.L.L.C.  
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Knoxville, Tennessee 37901  
Attorneys for Plaintiff, Chapter 7 Trustee

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Attorney for Debtor

**RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE**

This matter is before the court on the Motion to Set Aside Dismissal Order (Motion to Set Aside) filed by the Plaintiff Chapter 7 Trustee on November 3, 2003, seeking to set aside the court's Order entered on October 24, 2003, dismissing this adversary proceeding upon the Debtor's Motion to Dismiss All or Portions of Complaint (Motion to Dismiss) filed on September 30, 2003. The Plaintiff did not file a response to the Debtor's Motion to Dismiss within twenty days, as required by E.D. Tenn. LBR 7007-1, and the motion, being unopposed and well-taken, was granted. In support of his Motion to Set Aside, the Plaintiff avers that he inadvertently failed to file a response and was out of town when the response was due. As such, the Plaintiff requests that the court set aside its Order dismissing the Complaint and allow him an opportunity to amend his Complaint to set forth specific facts in support of his allegations. This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

In his Motion to Set Aside, the Plaintiff avers that when he received the Debtor's Motion to Dismiss, "it was inadvertently filed without a response being prepared. Plaintiff was on vacation and out of state in Florida from October 20, 2003 to October 29, 2003. Plaintiff did not intend for dismissal to occur and strongly believes that this case should be heard." The Plaintiff further argues that compliance with the Local Rules may be excused if an injustice would occur,<sup>1</sup> that "[d]efaults are not favored in the law, and allowing this case to proceed will not operate as any prejudice to the defendant." Finally, the Plaintiff states that he is prepared to amend his Complaint to set forth specific facts to deny the Debtor's discharge pursuant to 11 U.S.C.A. § 727(a)(2), (3), (4), and/or (5) (West 1993).

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<sup>1</sup> See E.D. Tenn. LBR 1001-1(b).

The court granted the Debtor's Motion to Dismiss, in part, because the Plaintiff did not file a response, as required by the Local Rules for the United States Bankruptcy Court for the Eastern District of Tennessee, specifically, Rule 7007-1, concerning Motion Practice, which states, in its entirety:

A motion filed in a[n adversary] proceeding shall be accompanied by a brief setting forth the facts and the law supporting the motion. Unless the court directs otherwise, the opposing party shall respond within twenty days after the date of filing of the motion. Any opposing response shall be supported by a brief setting forth the facts and the law in opposition to the motion. A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion. After the time for response has expired, the court may rule on the motion without a hearing. A party may request a hearing.

E.D. Tenn. LBR 7007-1. Here, the Debtor's Motion to Dismiss and supporting brief were filed on September 30, 2003. The Plaintiff had until Monday, October 20, 2003, to file a response and brief in compliance with Local Rule 7007-1. According to his Motion to Set Aside, the Plaintiff did not leave for his vacation until October 20, 2003, the deadline for filing a response. Accordingly, the Plaintiff had almost three weeks prior to his leaving town for filing a response to the Debtor's Motion to Dismiss, and he admittedly failed to do so.

"Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1648 (1992). The Plaintiff is well aware of the Local Rules, and his being out of town on the final day that he could file a response to the Debtor's Motion to Dismiss does not excuse his failure to file a response. Furthermore, the Plaintiff could have requested an extension of the twenty-day response time prior to leaving town. Finally, the court did not enter its Order until October 24, 2003, four additional days after the

response time had expired. The court cannot excuse the Plaintiff's failure to file his response within the time proscribed by E.D. Tenn. LBR 7007-1.

In addition, as previously stated, the court granted the Debtor's Motion to Dismiss only in part based upon the Plaintiff's failure to file a response. The court also granted the Debtor's Motion to Dismiss because it was well-taken. The Plaintiff did not set forth any facts in the original Complaint initiating this adversary proceeding upon which the court could grant the relief sought. The Plaintiff made allegations that the Debtor should be denied discharge pursuant to § 727(a)(2), (3), (4), and/or (5), and he set forth the wording of the Bankruptcy Code, but he did not provide any factual basis for such requested relief. Accordingly, the Plaintiff failed to state a claim, and the adversary proceeding was properly dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b).

Based upon the foregoing, the Plaintiff's Motion to Set Aside shall be denied. An order consistent with this Memorandum will be entered.

FILED: November 10, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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**ORDER**

For the reasons stated in the Memorandum on Plaintiff's Motion to Set Aside Dismissal Order filed this date, the court directs that the Motion to Set Aside Dismissal Order filed by the Plaintiff on November 3, 2003, is DENIED.

SO ORDERED.

ENTER: November 10, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE